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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91225578
Party	Defendant Todd Sammann
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Submission	Motion to Dismiss - Rule 12(b)
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Date	01/29/2016
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Narrative Capital Partners, LLC	)	
	)	
Opposer,	)	Opposition No. 91225578
	)	
v.	)	
	)	
Todd Sammann	)	
	)	
Applicant.	)	
	)	

**APPLICANT’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER  
RULE 12(b)(6) AND MEMORANDUM IN SUPPORT OF SAME**

Pursuant to Fed. R. Civ. P. 12(b)(6) and TBMP §503, Applicant Todd Sammann respectfully moves the Board to dismiss Opposer Narrative Capital Partners, LLC’s Opposition (the “Opposition”) to Application Serial No. 86/541546, filed February 20, 2015, for registration of the mark NARRATIVE CAPITAL (the “Applicant’s Mark”) for failure to state a claim upon which relief can be granted. As detailed herein, Opposer has failed to plead facts sufficient to support the claims asserted, and relief requested, in its Notice of Opposition filed on December 30, 2015 (the “Notice of Opposition”).

**ARGUMENT**

Applicant filed an intent-to-use service mark application for Applicant’s Mark on February 20, 2015 (the “Application”), which Application was published for opposition on September 1, 2015. Opposer filed the Notice of Opposition on December 30, 2015, at the end of the opposition period, claiming prior common law rights.

A motion to dismiss for failure to state a claim is a test of the legal sufficiency of a pleading. *See Carano v. Vina Concha y Toro, S.A.*, Opposition No 125,728 (T.T.A.B 2003) (*citing Libertyville Saddle Shop, Inc. v. E. Jeffries & Sons Ltd.*, 22 U.S.P.Q.2d 1594 (T.T.A.B. 1992)). When a complaint's sufficiency is challenged by a motion to dismiss, the Board must examine the complaint in its entirety, and construe the allegations liberally to determine whether the complaint contains claims which, if proved, would entitle the plaintiff to relief. *See Montecash LLC v. Anzar Enter. Inc.*, 95 U.S.P.Q.2d 1060 (T.T.A.B. 2010) (*citing Advanced Cardio. Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 U.S.P.Q.2d 1038 (Fed. Cir. 1993)); *see also NSM Res. Corp. v. Microsoft Corp.*, Cancellation No. 92057932 (T.T.A.B. 2014). To withstand a motion to dismiss, Opposer must allege facts that would, if proved, establish that it is entitled to the relief sought, specifically that (1) Opposer has standing to maintain the Opposition, and (2) a valid ground exists for opposing the subject application. *See Compagnie Gervais Danone v. Precision Formulations, LLC*, 89 U.S.P.Q.2d 1251 (T.T.A.B 2009); *see also Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780 (T.T.A.B. 2012) (*citing Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); TBMP § 503.02 (June 2014).

Opposer's sole statement in support of its allegation of prior use of Narrative Capital as a service mark is the following vague and conclusory paragraph:

Narrative Capital provides lending, investment and other financial services. Narrative Capital has acquired common-law rights in the service mark NARRATIVE CAPITAL, which is a word mark, by using the mark in connection with a variety of such services. This use, and Narrative Capital's resulting common-law rights, predates the filing of the Opposed Application; predates any priority date associated with the Opposed Application; and predates Applicant's first use, if any, of the Opposed Mark. Opposer's use of NARRATIVE CAPITAL in connection with its services has been continuous and has not been abandoned.

(Notice of Opposition at ¶4). While all of the facts alleged in the Notice of Opposition are accepted as true for this purpose, threadbare recitals of a cause of action's elements, accompanied by mere conclusory statements, as Opposer submits here, will not suffice. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555-56 (2007).

Opposer's legal basis for opposing registration of Applicant's Mark is dependent on its alleged prior use of the NARRATIVE CAPITAL mark. Curiously, and fatally, the Notice of Opposition does not allege a single salient fact in support of that prior use, aside from mere conclusory assertions. For example, the Notice of Opposition does not allege any facts supporting the most basic questions around such a use, namely:

- WHO: no actual or intended recipient is identified of any services, or offer of services, prior to February 20, 2015;
- WHAT: no facts concerning particular services offered or provided by Opposer under the NARRATIVE CAPITAL mark prior to February 20, 2015;
- WHY: no facts concerning the circumstances of any use of the mark prior to February 20, 2015, such as advertising campaigns or offers to potential consumers;
- WHERE: no facts concerning where Opposer used the mark, such as the place or location in which the mark was used, and in what medium the mark appeared;
- WHEN: no date of first use or any other date on which Opposer used Applicant's Mark prior to February 20, 2015; and
- HOW: no facts concerning the manner in which the mark was used by Opposer prior to February 20, 2015, such as how the alleged use was connected to any services, or indicating how such use would constitute a use in commerce under the Lanham Act giving rise to common law rights.

Due to this dearth of detail, the “facts” alleged in the Notice of Opposition relating to prior use, even if assumed in their entirety to be true, are insufficient for the Board to grant the relief requested. In an opposition proceeding based on priority and likelihood of confusion:

[a] plaintiff must plead (and later prove) priority of use. In order to properly assert priority, a plaintiff must allege facts showing proprietary rights in its pleaded mark that are prior to defendant's rights in the challenged mark. Such rights may be shown by, for example, . . . prior trademark or service mark use; or prior use analogous to trademark or service mark use.

TBMP §309.03(c)(A) (2015, citations omitted). Opposer fails to assert any instance of actual use of NARRATIVE CAPITAL as a service mark, and likewise fails to provide a date, month, or even year of Opposer’s alleged first use of NARRATIVE CAPITAL as a service mark.

Opposer’s naked claim of prior rights in the Applicant’s Mark is not a properly plead assertion of priority under TBMP §309.03(c)(A).

In sum, Opposer’s conclusory statements of priority set forth in the Notice of Opposition are unsupported and insufficient. We therefore submit that the Notice of Opposition does not properly plead prior use of Applicant’s Mark and, therefore, the Opposition should be dismissed.

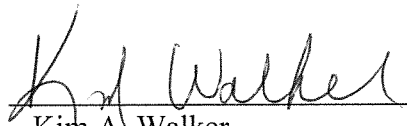
**CONCLUSION**

Opposer has failed to meet the very basic pleading requirements of a pleading before the Board to claim prior use of Applicant's Mark, as set forth in *Twombly* and *Iqbal*. For the reasons set forth herein, Applicant respectfully requests that the Board grant this Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

Dated: January 29, 2016

By:



Kim A. Walker

Eugene L. Chang

Meghan M. Hungate

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*Attorneys for Applicant*

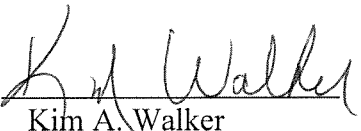
Todd Sammann

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this January 29, 2016, mailed by first-class United States mail, postage prepaid, the foregoing MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER RULE 12(b)(6) AND MEMORANDUM IN SUPPORT OF SAME to the following:

Naomi Jane Gray  
Harvey Siskind LLP  
Four Embarcadero Center, 39th Floor  
San Francisco, CA 94111-4115  
United States

By:   
Kim A. Walker  
January 29, 2016